Office Supreme Court, U.S.
FILED
APR 4 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 883

STATNI BANKA, CESKOSLOVENSKA,

Petitioner,

—against—

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Banka,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITIONER'S REPLY BRIEF

THE ISSUE PRESENTS A SUBSTANTIAL FEDERAL QUESTION

We cannot imagine any issue that is more clearly a federal question than that of the right of a state court to ignore a clear and unequivocal State Department certification of immunity for the property of a foreign sovereign government and a request for the release of that property from the judicial restraint imposed thereon. If the state court, as petitioner here urges, was bound to respect the Suggestion of Immunity and release the property thereby certified to be immune, the judgment of the state court cannot be sustained upon any ground of state law.

The importance of this question cannot be denied, for the State Department itself pointed this out in its letter of May 12, 1960:

> "The Department of State believes that an early decision by the Court in accordance with the suggestions of immunity filed in the Stephen and Wolchok cases, as amplified in this letter, would materially contribute to the successful conclusion of the negotiations with the Czechoslovak Government referred to above" (Zivnostenska Record, p. 180, f. 538).

Moreover, the erroneous determinations of the lower courts are significant beyond the facts of this particular case since, if unreversed, they will stand as a bad precedent. No other case exists wherein a State Department Suggestion of Immunity has not been ultimately held binding upon the judiciary.

THE DEPARTMENT OF STATE NEVER WAVERED FROM ITS ABSOLUTE SUGGESTION OF IMMUNITY IN THIS ACTION

Throughout his brief, respondent mistakenly argues that the State Department repeatedly changed its position and vacillated in its views. The list of various documents and letters on pages 5 and 6 of his brief, however, contains only one document applicable to this case. That is the Suggestion of Immunity, item number 4, dated June 22, 1959, which appears in full at pages 51 to 70, inclusive, of the Statni Record. The other letters and papers were all submitted by the Department because of the peculiar circumstances of the *Zivnostenska* case which are not in any way present in this action, and had nothing to do with the facts herein. In this action, the Department of State, from the outset and throughout the entire litigation, continuously has certified the absolute immunity of petitioner from this suit and of all of its property from the restraints imposed by the Courts.

THE ISSUE IS NOT RES ADJUDICATA

A.

The *ex parte* "temporary" order in this case (Statni Record, pp. 25-30) dated March 26, 1959, restrains all property of petitioner "that may be, or be found, in the State of New York." The restraints upon petitioner's property, which had been imposed in the *Zivnostenska* case, were limited to such property as was in New York on May 12, 1952. Thus the restraining order in this action includes much more, as a comparison of the annexes to the two Suggestions will show (Zivnostenska Record pp. 66-68 and Statni Record pp. 63-67). Moreover, the present restraining order also operates *in futuro*, so that any property which petitioner brings into New York hereafter becomes automatically subject thereto, and petitioner is disabled from ever safely doing business, on behalf of the Czechoslovak Government, with any New York banking organization. Obviously the determination in the *Zivnostenska* case could not apply to the additional assets involved in this case, in any event.

B.

Moreover, the *Zivnostenska* action and judgment did not purport to pass upon title to any assets at all, either of defendant therein or of this petitioner. It merely enabled the Receiver to bring proceedings to obtain possession of property of the Zivnostenska Bank. As to the property of this petitioner, the judgment continued the restraints for a period of only ninety (90) days (which have long since passed; Zivnostenska Record p. 23, ff. 67, 68) in order to give the Receiver the time to start this action. Thus, it is only the *ex parte* restraining order of March 26, 1959, in this action, which retains petitioner's immune property within the custody of the Court. The Receiver could not assert his right to petitioner's property save by this action against

petitioner; consequently, the right of the Czechoslovak Government to claim immunity and of the State Department to recognize it, even for property restrained pending the earlier action, was obviously not foreclosed by the *Zivnostenska* judgment.

C.

Neither petitioner nor respondent were parties to the *Zivnostenska* action. Contrary to respondent's statement that petitioner voluntarily submitted its immunity to the New York court for determination in that action, the Government of Czechoslovakia, in its 1952 note to the State Department, specifically declined to permit petitioner to submit to the jurisdiction. The Court thereupon appointed *amicus curiae* to defend the immunity claim, but an *amicus curiae* appointed by the court for a foreign sovereign not before the court cannot lay the foundation for a claim of *res judicata* (*Garland Co. Ltd.* v. *Filmer*, 1 Fed. Supp. 8, 13; *Brown-Gummer Inv. Co.* v. *Paulter*, 70 Fed. 2d 184). Furthermore, since petitioner was not a party to that action, it could not and did not appeal from the denial of immunity for the property there involved, and the affirmance by the Appellate Division in 1955 was without reference to any claim of sovereign immunity for any property whatsoever.

D.

The Suggestion of Immunity in the *Zivnostenska* action specifically states that the Department of State

> "* * * has always recognized a distinction between 'immunity from jurisdiction' and 'immunity from execution'. The Department has maintained the view that in accordance with international law property of a foreign sovereign is immune from execution to satisfy even a judgment in an action against a foreign

sovereign when "there is no immunity from suit" (Zivnostenska Record p. 10, f. 119).

Dexter and Carpenter, Inc. v. Kunglig, etc., 43 Fed. 2d 705, cert. den. 282 U. S. 896;

Bradford v. Chase National Bank, 24 F. Supp. 28, 38, aff'd 105 Fed. 2d 1001, 309 U. S. 632.

Thus, the Department's position was that its failure affirmatively to suggest immunity in 1952, did not prevent it from recognizing and certifying immunity for the property here involved, when proceedings analogous to execution were undertaken in 1959.

This view was stated by the Department in the *Zivnostenska* case; in this action the Department also conclusively recognized petitioner's immunity on the ground that any transfers to petitioner had been sovereign and public acts of the Government of Czechoslovakia which cannot be questioned by our Courts (Statni Record, p. 56, ff. 167, 168).

E.

Finally, it is clear that the Secretary of State is free to recognize or deny immunity as a purely political question in any individual case. All principles of local private law must give way to the policy of the Department when it affects the relations of the United States and a foreign country. That is the entire rationale of the decisions which accept the binding nature of a Suggestion of Immunity.

Ex Parte Peru, 318 U. S. 578;

Republic of Mexico v. Hoffman, 324 U. S. 30;

Rich v. Naviera Vacuba, 197 Fed. Supp. 710, aff'd 295 Fed. 2d 24.

Consequently, the Department was clearly within its rights in certifying immunity in this new action regardless of what it did or did not do in the earlier case, in 1952.

CONCLUSION

Under the determinations of the New York courts, petitioner cannot be sued because it is immune, but its property, now or ever hereafter found in New York, continues to be subject to seizure and restraint under the order of March 26, 1959 in this action. We cannot conceive of a more deliberate disregard by any Court for the decisions of the Executive Branch made within the sphere of its exclusive competence.

The issue is one of prime importance and the petition for certiorari should be granted.

LEMUEL SKIDMORE,
Attorney for Petitioner.